

# Class Actions for Tuition Refunds Based on COVID-19 Pandemic Closure? Ohio Appeals Court Weighs In

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College life was just one of the many things affected by the COVID-19 pandemic. Schools around the country were forced to close academic buildings, residence halls, and other campus facilities and to pivot to online instruction to ensure the safety of students, faculty, and staff.

As a result of these precautions, many higher education institutions were sued in class action lawsuits by students seeking full or partial refunds of tuition, fees, and other costs, largely on the theory that schools breached purported contracts with students to provide exclusively in-person education and related services. Hundreds of such cases have been filed, in both federal and state courts. Thus far, courts have issued mixed rulings on the merits of these claims.

Whether these cases are suitable for class treatment is hotly contested. Of particular focus are whether individual or class issues predominate and whether damages exist and are ascertainable in such class actions where determining student preferences, learning modalities, and educational objectives can be exceedingly difficult (if it is possible at all).

In *Smith v. Ohio State Univ.*, 2022-Ohio-4101 (Nov. 17, 2022), the Ohio Court of Appeals strongly suggests it is unlikely that tuition and fee cases can properly be litigated as class actions. The court's opinion also raises broader questions, beyond the wave of tuition refund cases, about the reliability of damages models proposed by plaintiffs in their efforts to obtain class certification.

### Class Certification Gets Rubberstamped

In *Smith*, the plaintiff, Brooke Smith, argued that undergraduate students at Ohio State University (OSU) should have been charged a lower tuition rate for the period of time remote classes were offered after the COVID-19 pandemic prompted a campus shutdown during the spring 2020 semester. She proposed to offer expert testimony about the market differences in tuition pricing for in-person classes and "emergency remote instruction."

For purposes of class certification, the plaintiff noted, the court need not consider the *merits* of her theory as to the relative market value of remote and onsite instruction; it only had to consider whether the question raised a classwide issue. To that end, she asserted that her experts had demonstrated how they intended to measure damages on a classwide basis: a market survey intended to evaluate the relative values of on-site and remote instruction.

It was the same model the expert had used to determine relative market values in consumer products class actions: elicit responses as to the importance of particular

features of a product at the point of purchase — say, the importance to student “consumers” of living on-campus —to ascertain the supposed reduced market value of the college experience for students due to the campus closure. The expert then would calculate damages from this “percentage overpayment factor.”

Significantly, the expert never actually conducted the survey; therefore, no actual evidence of any damages was presented — that is, no market difference between in-person and remote classes. All the trial court had to go on was the expert’s supposition that his survey likely would demonstrate such alleged damages.

### Is Expert’s Methodology Flawed?

OSU pointed to flaws in the expert’s methodology and argued the proposed survey was unreliable and untested as applied to college tuition. The survey assumed laboratory conditions; it did not propose to measure student preferences in the context of a pandemic-induced emergency, OSU noted, and did not account for the possibility that student preference for living on-campus may have changed once the pandemic hit or that some students valued graduating more than the mode of instruction used in completing their required credits.

Because the proposed methodology did not take these critical facts into account, the extent of students’ injury required individualized inquiries, OSU argued. Moreover, OSU noted, the methodology was not reliable as it rested on pure speculation as to whether a reduced market value for remote learning during the COVID-19 pandemic existed in the first instance. Indeed, the plaintiff’s own damages expert conceded that, while the plaintiff anticipated a “likely” outcome showing harm, the eventual survey results might well disprove her theory. Consequently, OSU asserted, there was neither classwide proof of a contract breach nor evidence of common injury.

Despite these failings, the trial court granted class certification (and denied OSU’s motion to exclude the expert testimony), finding the proposed, but wholly untested and incomplete, methodology ““maybe improbabl[e] or difficult[,]” but consistent with the plaintiff’s potential liability showing.

### “Rigorous Analysis” Required

The appeals court reversed the decision certifying the class, finding the lower court abused its discretion when it failed to conduct a rigorous analysis of the plaintiffs’ methodology for determining liability and damages existed and were ascertainable on a classwide basis. The lower court had simply assumed that each student suffered economic injury based on the fact of the campus closure (without showing that the proposed class of students were actually harmed by the closure). Finding proof of a common injury on this basis, without any actual evidence of harm presented by the plaintiff on behalf of the class, was an error of law.

Moreover, the appeals court said, the lower court gave short shrift to OSU’s argument that the plaintiff could not establish proof of injury when the expert, having not yet conducted the proposed survey, could not offer an opinion as to whether the value of the students’ educational experience was diminished as a consequence of the move to remote instruction.

### Takeaways

The trial judge in this case was eager to certify the class in order to turn to the merits

issues and noted her reluctance to wade into the merits at the certification stage. On review, however, the appeals court made clear that trial courts must ensure that their findings on class certification are supported by sufficient evidence and that may mean evaluating evidence — at the class certification stage — that goes to contested merits issues.

Trial courts cannot simply rubberstamp a proposed class because it is *possible* the class may have been damaged, the appeals court emphasized. Instead, actual evidence — developed through acceptable and reliable means by experts who perform research to support their findings — can be required to show that realistically provable class issues will predominate if class certification is granted. Until then, and especially when classwide damages or liability questions are based on rank speculation, class certification is not appropriate.

Please contact a Jackson Lewis attorney with any questions about higher education tuition and fee litigation or employment-related class actions.

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